

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JAMES S. PREKOP, )  
Plaintiff, )  
                )  
                v      ) 2:10-cv-1691  
                )  
PNC BANK,        )  
Defendant.       )  
                )  
                )  
                )

**MEMORANDUM ORDER**

Pending before the Court is DEFENDANT'S FED. R. CIV. P. 12(b)(6) MOTION TO DISMISS PLAINTIFF'S DISABILITY DISCRIMINATION CLAIM (Document No. 6), with brief in support. In support of its motion, Defendant PNC Bank ("PNC") has attached the original charge of discrimination filed with the EEOC on November 18, 2009 by counsel for Plaintiff, Erik Yurkovich. PNC has also attached the EEOC's "right to sue" letter dated September 28, 2010. Plaintiff James Prekop ("Prekop") has filed a response in opposition to the motion to dismiss (Document No. 8), and has attached a copy of an amended charge of discrimination which was allegedly filed with the EEOC on April 10, 2010. The motion is ripe for disposition.

The Complaint asserts causes of action for gender discrimination, disability discrimination and retaliation. PNC's motion seeks to dismiss only the "disability" claim. PNC contends that Prekop failed to exhaust his administrative remedies regarding the "disability" claim because his initial charge alleged only gender discrimination and retaliation. PNC's argument would be meritorious if proven. Moreover, the Court agrees with PNC that in some instances, a failure to exhaust administrative remedies can result in dismissal at the Rule 12(b)(6) stage of the case.

However, in this case, there is a material dispute of fact as to whether Prekop filed a charge of disability discrimination with the EEOC, and thus, exhausted his administrative remedies. Plaintiff asserts that he filed an amended charge of discrimination in April 2010. Indeed, Plaintiff has submitted an unsigned draft of the amended charge, which clearly alleges disability discrimination due to bipolar disorder and Prekop's status as a recovering alcoholic. At this stage of the case, the facts must be viewed in the light most favorable to Prekop, the non-moving party. PNC will have an opportunity to renew its contention, if warranted, based on a more fully-developed record.

In accordance with the foregoing, DEFENDANT'S FED. R. CIV. P. 12(b)(6) MOTION TO DISMISS PLAINTIFF'S DISABILITY DISCRIMINATION CLAIM (Document No. 6) is **DENIED**. Defendant shall file an Answer to Plaintiff's Complaint on or before April 7, 2011.

SO ORDERED this 24<sup>th</sup> day of March, 2011.

BY THE COURT:

s/Terrence F. McVerry  
United States District Judge

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